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REPLY BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 325

JAMES A. WATTS AND WALTER B. BLUE, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION[1]

Respondent says that "the charges of the superintendent's misconduct contained in the open letter were found, *with one minor exception,* to be false." (Resp. br. p. 2, emphasis supplied.) This claim might have constitutional relevance, on the theory that it would support a conclusion that petitioners recklessly disre-

[1] Without pointing to any inaccuracies in Petitioners' presentation of the record evidence, Respondent School Board broadly "adopts the recitation of facts" in the majority opinion below. (Resp. br. p. 1.) While there is much in that opinion which we do not accept, we have confined the expression of our disagreement with the court below to those matters only which bear directly on the issues before this Court.

garded the truth and thereby forfeited the protection of *New York Times* v. *Sullivan*, 376 U.S. 254. But the accusation is entirely unwarranted. Not even the School Board found that paragraphs 1, 2, 3, 7, 9, 9a, 9b or 10 were false.[2] (See Pet. br. pp. 9a-11a.) Nor was anything in the unnumbered paragraphs of the Letter, which further informed the public about the teachers' "current struggle for a good school" (Pet. br. p. 1a), found to be untrue. What the School Board did find, and the court below said was "supported by substantial evidence" as defined by Alaska law (App. pp. 65-66), was that petitioners made six false statements. We show in an appendix to this brief that these findings are either contrary to the evidence, or misinterpret the Open Letter, or label as "false" what are essentially expressions of opinion. Parallel techniques were used by the appellee Board of Education in the companion case, *Pickering* v. *Board of Education*.[3] The facility with which school boards find to be "false", criticisms of themselves or their policies, and thereupon discharge or discipline the critics, vividly demonstrates how a test of truth for public employees' criticism of their superiors would deter them from "voicing their criticism, even though it is believed to be true", *New York Times, supra*, 376 U.S. at 279.

Respondent asserts that "the record clearly shows that Mr. Watts made repeated efforts to solicit the support of his fellow employees to join a political campaign to oust their superintendent" (Resp. br. p. 14). Such

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[2] What does respondent regard as the "one minor exception"? Is it par. 3 (failure to comply with the regulations requiring periodic fire drills), or perhaps par. 7, charging "Dictatorial treatment of the teachers"?

[3] See Brief for Appellant, No. 510, October Term, 1967, pp. 55-67; Brief for Appellee, *id.*, pp. 10-11.

political activity does not lose its constitutional protection even if it is "repeated", but misstatements of what "the record clearly shows" require a response. Richardson expressly denied that Watts had made "a direct statement in soliciting me to oust the superintendent"; the most that he was able to say, on prompting by the School Board counsel, was, "There were certain overtones during the Spring of 1959". (App. p. 161.) Although the School Board gave as one of its reasons for discharging Watts that he solicited Richardson (Finding #20, Pet. br. p. 12a), the court below did not affirm on that basis (App. p. 92). Watts' conversation with Mr. Naegel was not even adverted to in the Board's own findings, or in the Notice of Nonretention.[4]

Contrary to Resp. br. p. 14, the School Board made no finding that Watts' conversation with the Framptons occurred during school hours, but the court below did so state and attached considerable significance to this circumstance (App. pp. 67-69). We think it is irrelevant, since it is not and cannot be claimed that Watts was thereby neglecting any of his teaching duties, or interfering with the Framptons' exercise of theirs, or disturbing the children.[5] There is likewise

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[4] According to Mr. Naegel's testimony, this conversation occurred on the first or second day of the 1960 school year, when Watts had already been discharged (App. p. 547).

[5] In Frampton's words, "this certainly was before the children get there" (App. p. 149). In any event, despite the unqualified assertion in the opinion below, the record simply does not establish when the meeting took place. Mr. Frampton first said that it was "before school". On further prompting he said that he "can't say definitely. I imagine it was somewhere between 8:30 and 9:00, however". (*Id.* p. 146.) Asked on cross-examination whether it could have been before 8:30, he replied, "It's possible, I couldn't say." (*Id.* p. 150.) Mrs. Frampton did not testify regarding the time of the meeting. Watts testified, after describing the conversation, that he "left because it was almost time for 8:30 bell." (App. p. 204.)

no evidence that Watts was "acting in his individual capacity and not as a member of any group" (Resp. br. p. 14). He himself testified that he spoke to the Framptons on behalf of the Executive Committee of the Seward District Teachers Association; and the Framptons said that he invited them to "go along with a group of which he was a representative" (Finding #19, Pet. br. p. 12a). The only conflict was as to what Watts stated the objective of the group to be; on this the School Board accepted the Framptons' version. Contrary to respondent's claim, however, it did not find —nor was it ever even suggested—that Watts had been acting on his own.[6]

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[6] The statement of the court below cited by respondent (p. 14, n. 15) was only that the SDTA did not authorize a move to oust the superintendent. (App. p. 69.) This is true, and seems to us to be strong circumstantial evidence that Watts did not state it to be his group's objective.

In our opening brief we reserved our objection to the school Board's acceptance of the Framptons' testimony in opposition to that of Watts. (Pet. br. p. 3, n. 2). We did not argue the matter at length because there are two separate legal grounds for reversal even if the finding is accepted: (1) his activity was constitutionally protected, and (2) the statutory provision relied upon to sustain his discharge is unconstitutional. But since respondents assert (p. 14, n. 14) that we have not "specifically argued" that the factual finding is unsupported by the record, we hasten to point out the following:

(1) The objective evidence strongly confirms the probability that Watts' version of the discussion was accurate. See Pet. br. pp. 7-9.

(2) The finding is couched in the same terms as Finding #20, that Watts solicited Richardson. But the record shows no "conflict in the testimony between Mr. Richardson and Mr. Watts." This suggests that the same phraseology in the findings regarding the Framptons is artful draftsmanship, rather than a fair assessment of the record. (*Continued on* p. 5)

I. Petitioners' Discharge Violates the First Amendment.

Our opening brief rests squarely on prior decisions of this Court which establish that petitioners' discharge violates the First Amendment. Yet of the cases cited therein only two are referred to by respondent—*New York Times* v. *Sullivan*, 376 U.S. 254 and *Wood* v. *Georgia*, 370 U.S. 375—and respondent seeks to trivialize both.[7] (Resp. br. pp. 10, 17.)

Wood v. *Georgia* conclusively refutes the contention that "the appropriate standard of review is whether

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(3) Other School Board findings are either demonstrably erroneous, or argumentative. See App. A, *infra*.

(4) While the finding regarding Watts and the Framptons was affirmed by the State Board of Education Appeal Committee, the opinion of that body revealed a complete misunderstanding of the record. See Pet. br. p. 13, text and note at n. 10.

(5) The record shows Mrs. Frampton to have been a less than candid witness, who chose not to answer a question "because there is no way to answer it that doesn't put me in the soup" (App. p. 554).

[7] When one recalls that respondent in *New York Times* v. *Sullivan*, 376 U.S. 254, had argued that "libel" is outside the protection of the First Amendment (see *id.* at 268-269), the School Board's effort to restrict its authority to cases involving "a state's power to enforce its defamation laws against those who criticize its own employees" (Resp. br. p. 14) is not without irony. But it is plainly without merit, all the more so after *Bond* v. *Floyd*, 385 U.S. 116, 136. Respondent's attempt to limit *Wood* v. *Georgia*, 370 U.S. 375, to its immediate facts, overlooks that part of the *Wood* opinion which addresses itself to, and rejects, the state's contention that "because the petitioner is sheriff of Bibb County and thereby owes a special duty and responsibility to the court and its judges his right to freedom of expression must be more severely curtailed than that of an average citizen", 370 U.S. at 393. See also *Bond* v. *Floyd*, 385 U.S. at 135-137, disapproving a similar contention regarding state legislators.

there is evidence in the record which rationally justifies a finding of good cause." (Resp. br. p. 10, initial capitals omitted; see also *id.*, p. 12.) For under *Wood*, the test to determine whether utterances on public issues may be punished as contempts is whether they constitute a "substantive evil actually designed to impede" the administration of justice. *Id.* at 389. We regard *Wood* as being particularly close to the present case, because First Amendment rights are entitled to at least as great protection when their exercise is sought to be restricted in favor of agencies of government other than the courts. But *Wood* is not alone; it is in the mainstream of this Court's decisions which tolerate restrictions on the exercise of First Amendment rights only when the State can show a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524.[8]

None of the governmental interests which have hitherto been asserted to justify petitioners' discharge is sufficient under this standard (Pet. br. pp. 29-41). And *New York Times* v. *Sullivan*, which respondent says "does not directly bear on the present case" (Resp. br. p. 14) establishes not only that petitioners' activities were of the precise character which the First Amendment was designed to protect, but that the countervailing interests which the School Board asserts are wholly inconsistent with the fundamental premises of our democratic society. Respondent objects that petitioners' activities were "disruptive" because they "took their grievances to the public, thus forcing other em-

[8] As *Mine Workers* v. *Illinois State Bar*, 389 U.S. 217, 223-225 again demonstrated, this overriding need must be actual, not merely speculative. Since the present case involves direct interference with the First Amendment rights of free speech and association, *Mine Workers* is the professional misconduct case in point, rather than *Schware* or *Konigsberg* (Resp. br. pp. 10, 11).

ployees [9] and the citizenry into two camps" [10] (Resp. br. p. 15); "that the purpose of the letter was to stimulate public reaction, short of a recall election, to bring pressure to bear on the School Board to take the steps outlined in the letter" (*id.*);[11] and further, that they "admittedly ignored established democratic procedures for obtaining redress [by attempting] to arouse and inflame the public * * *".[12] These are not reasons for

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[9] Without considering its relevance, we note that the observation that the Open Letter "forced employees to choose sides" (Resp. br. p. 15) is baseless. On the contrary, the existing sharp division within the school system was one of the causes for publishing the Open Letter.

[10] While this formulation artfully attempts to bring the case within *United Public Workers* v. *Mitchell*, 330 U.S. 75, it would encompass all political discussion. The Open Letter was "disruptive" and "divided the public into two camps" precisely because it dealt with an issue of great public concern—"the manner in which government is operated or should be operated", *Mills* v. *Alabama*, 384 U.S. 214, 218.

[11] The Board cites Tr. 284 (App. 412-413). We quote the pertinent testimony:

> "Mr. Burr: Did you, at the time of distribution of Exhibit 7 to the public, believe that the public at large could remedy the situation, short of a recall election?
>
> Mr. Swick: Yes, sir.
>
> Mr. Burr: And what course of action did you propose that the public at large could do to remedy what you have set forth in Exhibit 7?
>
> Mr. Swick: Mr. Burr, since we had failed to make contact with the Board, we felt that by making this information available to the rest of the public, that perhaps some of their friends that they would listen to, would get them to examine the truth of the statements and perhaps take appropriate action such as we asked on page 3, namely, that they would demand immediate guaranteed and substantial improvement in the administrative policies, and we outlined them there. There's nothing wrong with that."

[12] Resp. br. p. 19, quoting the Court below (App. p. 86).

denying First Amendment protection to the Open Letter; on the contrary, they establish that the Letter fulfilled the great purpose of that Amendment. *Stromberg* v. *California,* 283 U.S. 359, 369; *DeJonge* v. *Oregon,* 299 U.S. 353, 365; *New York Times* v. *Sullivan,* 376 U.S. 254, 269-271; *Bond* v. *Floyd,* 385 U.S. 116, 136.

Neither the distribution of the Open Letter nor Watts' solicitation of the Framptons[18] can be forbidden under *United Public Workers* v. *Mitchell,* 330 U.S. 75, or the recent state cases which Respondent cites. (See Resp. br. pp. 13-16.) The sentence in the *Fort* opinion which immediately precedes the passage quoted by Respondent reads as follows: "It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service." Since no such showing can be made with respect to petitioners' activities herein, it would do violence to the principles followed by the California Supreme Court to sustain their discharge. And while Respondent relies heavily on *United Public Workers* v. *Mitchell, supra,* it acknowledges that the immorality provision of the tenure statute contains "no legislative judgment . . . that any particular action justifies the imposition of the penalty of dismissal" (Resp. br. p. 6), thereby substantiating

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[18] Aside from this argument, Respondent attempts to sustain this additional ground for Watts' discharge almost exclusively on the factual premises which we have shown to be erroneous. See pp. 2-4, *supra.* Respondent also points out that "Mrs. Frampton testified that she was 'completely shocked at the request'" (Resp. br. p. 14). But this is without constitutional significance. *Cantwell* v. *Connecticut,* 310 U.S. 296, 310; *Terminiello* v. *Chicago,* 337 U.S. 1, 4; *Cox* v. *Louisiana,* 379 U.S. 536, 551; *Ashton* v. *Kentucky,* 384 U.S. 195, 199-200.

our position that *Mitchell* is not authority for petitioners' discharge. (See Pet. br. pp. 40-41.)

Respondent steadfastly maintains that obedience to its grievance procedures overrides petitioners' First Amendment right to express their views to the public:

> "An employer's interest in having employee grievances go through channels before being taken to the public by means of strike or 'open letters', is not only a reasonable interest, but is a compelling need. What separates democracy from mob rule is the existence of procedural means for orderly change." (Resp. br. p. 20.)

This statement merits special attention, cf. *New York Times* v. *Sullivan,* 376 U.S. at 279, n. 19. When Respondent School Board equates the distribution of information to the public and like political activity, with the strike, it betrays its hostility to the legitimate aspirations of its teachers. (See also App. pp. 246, 416-417.) Indeed, Respondent's gratuitous interjection of the problems posed by public employee strikes gives added force to Petitioners' First Amendment claims. Since they are generally forbidden to strike, the opportunity to address the public and engage in related political activity to improve their working conditions is clearly of the essence of public employees' rights of free speech and association.[14] The asserted equation

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[14] For this reason and also because the electorate is ultimately responsible for his working conditions, the public employee has even greater need than those in private industry to keep open the channels of communication with the public.

The Open Letter would be entitled to the protection of the First Amendment even if it were viewed as simply dealing with a labor dispute or an effort to protect the teachers' own jobs. For "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress

breaks down for an even more significant reason. Whereas a strike may adversely affect the public interest in uninterrupted essential services, the "paramount public interest in a free flow of information to the people concerning public officials, their servants",[15] is postulated and preserved by the First Amendment "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means."[16] Not a word in Respondent's brief, or in the opinion below, acknowledges the value to the public of free and full debate of public issues, which is the true "procedural means for orderly change" in our democracy.

II. The Statute and Regulation on Which Petitioners' Discharge Was Based Are Unconstitutionally Vague and Overbroad.

Respondent argues that "members of the profession must be charged with general knowledge of what conduct is unprofessional or may constitute 'cause' ". (Resp. br. p. 9.) If this is so, it can only be because commonly known and accepted standards of the profession supply meaning to the statutory language. But Alaska's teacher tenure law, as construed by its highest court, provides no such frame of reference to the teacher, for it subjects his job rights to a judgment "of

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of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.' " *Mine Workers* v. *Illinois State Bar*, 389 U.S. 217, 223, quoting from *Thomas* v. *Collins*, 323 U.S. 516, 531. See also *Senn* v. *Tile Layers*, 301 U.S. 468, 478; *Thornhill* v. *Alabama*, 310 U.S. 88, 102-103; *Cafeteria Employees* v. *Angelos*, 320 U.S. 293, 296.

[15] *Garrison* v. *Louisiana*, 379 U.S. 64, 77.

[16] *Stromberg* v. *California*, 283 U.S. 359, 369.

degree depending upon the rules of society and to some extent upon the mores of the particular community" (App. p. 52). To require a teacher to "divine prophetically" whether a particular act or utterance will lose him his position under this essentially *ad hoc* test, "is to exact gifts that mankind does not possess", *International Harvester v. Kentucky,* 234 U.S. 216, 223-224. But it is urged that the immorality statute should not be struck down because vagueness is necessary in statutes of this character. (Resp. br. pp. 8-9.) This argument was fully anticipated at Pet. br. p. 42, but we might add that the supposed difficulty can readily be avoided. The legislature need only define the specific political activities which are forbidden, and provide that these prohibitions are exclusive, so that general language in a civil service or tenure statute, such as "good cause", "non-professional conduct", or "immorality", does not reach political activities.[17]

In our opening brief we demonstrated that the "immorality" provision is also unconstitutionally overbroad because, as construed by the Supreme Court of Alaska, it authorized the discharge of Petitioner Blue for his speech to the longshoremen, although, as that court recognized, such discharge would violate the

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[17] Compare the *Report of the Commission on Political Activities of Government Personnel,* Vol. One, pp. 4, 17, 19-21, and 46-48 (G.P.O., 1968). This Commission, which was charged by Congress with considering the advisability of amending the Hatch Act and kindred legislation, observed that judicial trends since *United Public Workers* v. *Mitchell,* 330 U.S. 75, "have strengthened this Commission's convictions that legislative prohibitions which restrict political activities of public employees should be drawn as specifically as is feasible"; and that these "should be no more extensive than is necessary to protect the merit system and the integrity of the public service." *Id.* p. 17.

First Amendment. Respondent does not dispute this analysis, contending only that "the statute was not the kind of statute that would be subject to the objection of overbreadth." (Resp. br. p. 6, initial capitals omitted). The argument appears to be that since the legislature has made no judgment at all as to what conduct constitutes cause for discharge, the only issue is whether the delegation of such judgment to school boards is permissible. No authority is cited for the proposition that the delegation and overbreadth doctrines are mutually exclusive. It is readily refuted. This Court explained in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609:

> "Where statutes have an overbroad sweep . . . those covered by the statute are bound to limit their behavior to that which is unquestionably safe."

That hazard is no less where the power to define the standards is delegated to a school board or other administrative officials. Under the laws struck down in *Keyishian*, the legislature had delegated to the Board of Regents authority at least as great as that which school boards exercise under the Alaska tenure statute.[18]

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[18] In *United States* v. *Robel*, 389 U.S. 258, the Court struck down as overbroad a statute which forbade certain persons from working in a "defense facility", so designated by the Secretary of Defense. The concurring opinion of Mr. Justice Brennan reasoned that the statute constituted an impermissible delegation of power to the Secretary. He did not suggest that the overbreadth principle was thereby rendered irrelevant; rather, he was not persuaded that the statute was overbroad, *id.* at 269, 271-272. The opinion of the Court noted that the delegation issue had been raised, 389 U.S. at 261, n. 5, and nothing therein indicated that the scope of the delegation was thought to be germane to the overbreadth issue which the Court regarded as dispositive.

Petitioners' "violation" of Regulation E-7 by circulating the Open Letter was not an "adequate state ground" for their discharge (Resp. br. p. 20) because the regulation does not embody an "overriding" interest justifying the imposition of a penalty for their exercise of First Amendment rights, and because it is itself unconstitutional. We have already shown (pp. 9-10, *supra,*) that the policy of Regulation E-7 (Resp. br. pp. 18-20) is utterly inconsistent with that of the First Amendment. Moreover, the regulation is itself unconstitutional for two reasons—vagueness and overbreadth.[19] Respondent would avoid these objections by arguing that the "court did not find that E-7 was violated because of the distribution of the open letter to the public" (Resp. br. p. 21). This reading disregards the Court's explanation of the purpose of the regulation in its opinion (quoted in Resp. br. pp. 18-19), as well as other portions of Respondent's own brief, where the regulation is said to satisfy a "compelling need"—the "employer's interest in having employee grievances go through channels before being taken to the public by means of strike or 'open letters'

[19] Respondent asserts that these issues were not properly raised below, because they were first presented in the Petition for Rehearing. This objection is without merit. In this very case, the Supreme Court of Alaska affirmed Petitioners' discharge in part by deciding an issue which had not been raised or briefed by any of the parties (see App. pp. 65-66) over the objections of the dissenting Justice to this procedure (App. pp. 92-98). This brings into play the principle of *Williams* v. *Georgia,* 349 U.S. 375, 383: "A state court may not in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." Accord: *Shuttlesworth* v. *Birmingham,* 376 U.S. 339; *Barr* v. *City of Columbia,* 378 U.S. 146, 149.

. . ." (Resp. br. p. 20).[20] Respondent's attempt to reconcile regulations E-7 and E-9[21], (Resp. br. p. 19) seems to us rather to compound the confusion between their commands. (See Pet. br. p. 45, n. 30) To urge, as respondent now does, that the gravamen of the violation of E-7, read in light of E-9, is the attempt to "force" the School Board to act on the grievance without giving the Superintendent a prior opportunity, disregards the second sentence of E-7[22], and the practice followed by the Board itself in its dealings with the teachers both before and after the publication of the Open Letter[23], when no suggestion was made that the regulation was violated. Under these circumstances, to sustain petitioners' discharge for violating the regulation would be worse than imposing sanctions for disobedience to "commands simply vague or even contradictory. There [would be] active misleading." *Raley* v. *Ohio*, 360 U.S. 423, 438; cf. *Cox* v. *Louisiana*, 379 U.S. 559, 571.

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[20] Respondent's belated contention departs also from the theory on which it tried the teachers. See *e.g.* App. pp. 182-183; 211-212, where Board Counsel sought and obtained concessions from both that they had circulated the Open Letter to the public without processing their grievances through the superintendent.

[21] These are set forth in Appendix C, pp. 14a-15a of our opening brief.

[22] "Any employee or group of employees may at any time appeal to the Board".

[23] The original March letter of the Grievance Committee of the Seward District Teachers Association, addressed to the School Board with a copy to the Superintendent, requested a meeting with the School Board. (See Pet. br. p. 4; App. pp. 226-228.) Again, after the Open Letter was distributed, the School Board responded thereto and the requested meeting was ultimately held. (See Pet. br. pp. 8-9; App. pp. 242-246.)

CONCLUSION

The judgment below must be reversed because the statute and regulation on which petitioners' discharge was based are unconstitutional. Moreover, there is at the heart of this controversy the issue which divided School Board Counsel and petitioner Blue at the hearing:

> "MR. BURR: * * * Do you believe that the Freedom —that the right, that what we recognize as a constitutional right of freedom of speech includes the right of any person to make a public statement of an adverse nature about another person's character?
>
> MR. BLUE: In special circumstances, sir, I believe it's a moral right.
>
> MR. BURR: Do you believe it's a constitutional right—I'm not talking about moral rights, Mr. Blue.
>
> MR. BLUE: I believe that as a constitutional right, one does have the right to make a statement which may be adverse to a person's character, if this is on a very serious and important matter, and if it is something that the speaker regards as being necessary to be brought to the attention of the public." (App. p. 468.)

This debate was resolved some three years later, when this Court decided *New York Times v. Sullivan*, 376 U.S. 254.

Respectfully submitted,

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